Supreme Court, U.S.
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No. 96-1571

In the
Supreme Court of the United States
October Term, 1996

KARE 11, an NBC affiliate and a division of Combined Communications Corp., an Arizona corporation and Gannett Co., Inc., a Delaware corporation,

Petitioners,

vs.

C. THOMAS RYTHER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should the Supreme Court review the propriety of giving a jury instruction which was not requested by either party at the trial court level nor raised as an issue on appeal?

2. Does a district court have discretion to give a jury instruction which fully and correctly states the law but does not include the specific language requested by a party?

3. Should the Supreme Court grant certiorari where the resolution of a possible conflict in the federal circuits regarding the holding in the Supreme Court case of *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993) will not change the outcome of a case which has met a strict application of *Hicks* upon a motion for judgment as a matter of law?

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No. 96-1571

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

KARE 11, an NBC affiliate and a division of Combined Communications Corp., an Arizona corporation and Gannett Co., Inc., a Delaware corporation,

Petitioners,

vs.

C. THOMAS RYTHER,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

Respondent C. Thomas Ryther ("Ryther") includes this Statement of the Case, pursuant to Rules 15.3 and 24.2 of the Rules of the Supreme Court of the United States, as the Petition for a Writ of Certiorari ("Petition") misstates facts and mischaracterizes the *en banc* decision of the Eighth Circuit.

Ryther rejects the factual portion of the Petition's Statement of the Case because petitioners KARE 11, Combined Communications Corporation, and Gannett Co.,

Inc. ("KARE") improperly state the facts in the light most favorable to KARE and, from these facts, draw impermissible inferences. *See Brook Group v. Brown & Williamson Tobacco*, 509 U.S. 209 (1993); *Eckenrode v. Pennsylvania R. Co.*, 335 U.S. 329 (1948).

Ryther, a sportscaster at a television station in Minneapolis/St. Paul, Minnesota for 12 years, brought claims of age discrimination under the Federal Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.*, (1967), as amended, against KARE after he was terminated in July 1991. Ryther was 53 years old at the time of his termination and was replaced by a 33-year-old subordinate who was attracting fewer viewers in the market. KARE claims that it relied on market research when making the decision to terminate Ryther.

Ryther proved the decision to terminate his employment was made prior to the market research being initiated and KARE used the research as an excuse to terminate him. Ryther was treated less favorably than the younger sportscasters, and his performance and integrity were inappropriately challenged by KARE management to the point of humiliation. Additionally, KARE created an atmosphere that was antagonistic to older employees.

A more detailed review of the factual record appears in Sections I and III of the majority opinion in *Ryther v. KARE II*, 108 F.3d 832 (8th Cir. 1997) (*en banc*), and is adopted herein by reference. *See* App., pp. 3-6, 11-30.[1]

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[1] References to the Appendix attached to the Petition are designated as "App."

The Eighth Circuit, sitting *en banc*, affirmed the trial court's denial of KARE's motions for judgment as a matter of law and for a new trial in an opinion written by Judge Donald Lay, formerly the Chief Judge of the Eighth Circuit Court of Appeals. The majority opinion clarifies the standard for determining whether a plaintiff has presented sufficient evidence to sustain a jury verdict on an age discrimination claim. The court held that a verdict is sustainable only if the evidence of pretext is consistent with a reasonable inference of discrimination. App., p. 9. The court carefully examined the evidence in the case and determined that Ryther had presented "sufficient evidence as a matter of law to allow the trier of fact to find intentional discrimination." App., p. 28.

The Eighth Circuit affirmed the denial of KARE's motion for a new trial, finding that the language of the jury instruction adequately placed the burden of proving age discrimination on Ryther. The majority opinion did *not* address the propriety of a jury instruction proposed in E. Devitt, C. Blackmar, M. Wolff, *Federal Jury Practice and Procedure* ("*Devitt & Blackmar*") or the propriety of omitting burden-shifting language altogether as these issues were not raised by KARE either at trial or on appeal.

KARE's misstatement of the facts and mischaracterization of the Eighth Circuit decision are evident in the "Questions Presented" portion of the Petition. While the second question raises issues of stray comments and adverse actions against other employees, these issues are not addressed in the Petition. Therefore, Ryther has included a "Questions Presented" section in his Brief in Opposition to Petition for a Writ of Certiorari.

REASONS FOR DENYING PETITION

I. THE SUPREME COURT SHOULD NOT REVIEW THE PROPRIETY OF GIVING A JURY INSTRUCTION WHICH WAS NOT REQUESTED BY EITHER PARTY AT THE TRIAL COURT LEVEL NOR RAISED AS AN ISSUE ON APPEAL.

KARE urges this Court to review the *en banc* decision of the Eighth Circuit to resolve a perceived split among the circuit courts on the issue of whether a jury should be instructed on the *McDonnell Douglas*[2] burden-shifting paradigm. Petition, pp. 21, 23. KARE discusses, at length, the views of various circuits on the advisability of giving a *McDonnell Douglas* instruction, arguing that "once an employee [sic] offers a legitimate reason for the decision, burden-shifting instructions become irrelevant and misleading." Petition, p. 22. KARE has not preserved this issue for review. *See City of Springfield, Mass.* v. *Kibbe*, 480 U.S. 257 (1987). KARE did not object to the court giving a burden-shifting instruction and even proposed its own comprehensive instructions on the *McDonnell Douglas*

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[2] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). This case established the procedure by which circumstantial evidence of discrimination is evaluated. A plaintiff bears the initial burden of proving a *prima facie* case of discrimination. The burden then shifts to the employer to articulate a non-discriminatory reason for its employment action. If the employer meets this burden of production, the inquiry moves to the ultimate issue of discrimination. The plaintiff must prove that the proffered reason is a pretext for discrimination. *See St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506-508 (1993).

analysis. In *City of Springfield*, this Court held, "We think . . . that there would be considerable prudential objection to reversing a judgment because of instructions that petitioner accepted, and indeed itself requested." *City of Springfield*, 480 U.S. at 259.

When the trial court indicated a willingness to exclude all burden-shifting language from its jury instruction, KARE ignored the offer.

> THE COURT:
>
> * * *
>
> All that is -- that, you know, the maneuvering in the McDonnell Douglas context -- is, you know, that pretext -- you know, the way it starts out, "Is there discrimination?" And the plaintiff has to prove that he was discriminated against.
>
> Now under McDonnell Douglas -- which is really a test set up for courts; it wasn't sit [sic] up for juries; it was set up for courts to deal with it -- there is a prima facie case that you brought on and, if the defendants can show that they had a good reason, therefore the prima facie case goes away -- and if you start trying to tell the jury all of those concepts, pretty soon they get so confused.

> All that is, is a way of bringing forth the evidence, and dealing with the production-shifting issues, and I am not even sure we should put any of that in.
>
> You know, if you were to say, "Let's just knock out the last part of that," I would be tempted to agree.
>
> MR. TINKHAM: I think, Judge, that from the defendant's point of view we have the right to have the jury understand as a matter of law that, if the reason offered has not been proven pretext, they are to find there is no discrimination. That is what this instruction does not do. So that I think that it has to say that in some fashion, that -- given the fact that there has been an offer of non discriminatory reasons -- unless that is proved to be pretext, we are entitled to an answer "No" to question one.

TR VII/171-172.[3] KARE did not take the opportunity to have a jury instruction given which omitted the *McDonnell Douglas* language.

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[3] The transcript is cited herein as "TR" followed by the volume number and then page number.

KARE did not raise the issue of whether a burden-shifting instruction should have been given in its post-trial motions, its appeal to the Eighth Circuit, or its motion for rehearing *en banc*. Neither the trial court nor the Eighth Circuit panel discussed the issue. The issue was only addressed by the dissent in the *en banc* decision, which indicated, *in dictum*, a preference for such an instruction. KARE now has inappropriately raised this issue for the first time in the Petition. This Court should not address the propriety of giving a *McDonnell Douglas* jury instruction because KARE did not preserve the issue for appeal.

II. THE TRIAL COURT'S JURY INSTRUCTIONS FULLY AND CORRECTLY STATED THE APPLICABLE LAW.

KARE fails to articulate any justification for this Court's review of whether the trial court's jury instructions sufficiently set forth Ryther's burden of proof. The trial court is allowed broad discretion in formulating jury instructions. *See United States v. Logan*, 49 F.3d 352 (8th Cir. 1995). The trial court crafted a *McDonnell Douglas* jury instruction which twice stated that Ryther bore the burden of proving age discrimination.[4] The trial court's rejection of the specific

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[4] The instruction included the following language:

* * *

> In order for you to find for plaintiff, *plaintiff must prove* by a preponderance of the evidence that his *age was a determining factor* in the defendants' decision not to review his contract.

* * *

language requested by KARE does not render the instruction reversible error or worthy of certiorari. *See Stemmons v. Missouri Dept. of Corrections*, 82 F.3d 817, 819 (8th Cir. 1996) (party is not entitled to "demand" that a jury instruction include specific language); *Slathar v. Sather Trucking Corp.*, 78 F.3d 415 (8th Cir.) (actual wording of instructions is within discretion of trial court as long as jury receives an accurate explanation of the law), *cert. denied*, _____ U.S. _____, 117 S. Ct. 179 (1996); *Cf. Victor v. Nebraska*, 511 U.S. 1, ___, 114 S. Ct. 1239, 1242 (1994) ("The Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof.").

KARE masks the narrow issue of the exercise of discretion in formulating jury instructions by arguing that the jury instruction at issue will be used by other courts as it is derived from a standard jury instruction guide. KARE erroneously states that the *en banc* court "split evenly" on the propriety of a jury instruction contained in *Devitt & Blackmar*. Petition, p. 3. The majority opinion never addressed the *Devitt & Blackmar* instruction. The Supreme Court's standard for review by certiorari does not include editing *Devitt & Blackmar*, particularly where the instruction

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> Defendants have offered evidence of legitimate, non-discriminatory reasons for their actions, therefore, *plaintiff must prove by a preponderance of the evidence that the reasons offered by defendants are merely a pretext or cover-up for intentional age* discrimination.

Petition, pp. 9-10 (emphasis added).

given differs significantly from the published instruction. *See* Sup. Ct. R. 10.1.

KARE acknowledges that the jury instruction given by the trial court differs from the *Devitt & Blackmar* instruction in the critical language explaining the effect of the prima facie case. Petition, p. 18. KARE fails to note, however, that the jury instruction also differs from the model instruction in its description of the plaintiff's final burden. Whereas the *Devitt & Blackmar* instruction would permit the jury to find for the plaintiff if the reason proffered by the employer was not truthful, the trial court's instruction specifically requires the plaintiff to prove that "the reasons offered by defendants are merely a pretext or cover-up for intentional age discrimination." Petition, p. 10. The trial court exercised independent discretion in crafting the jury instruction, and there is no compelling reason for this Court to scrutinize the chosen language.

KARE further contends that the Eighth Circuit's reliance on a general instruction setting forth plaintiff's burden of proof to buttress the burden-shifting instruction is inconsistent with *Francis v. Franklin*, 471 U.S. 307 (1985). In *Francis*, a criminal defendant challenged a jury instruction which required the jury to draw an inference of intent unless rebutted. While recognizing that a jury instruction must be considered within the context of all the instructions, the Court found that a general instruction regarding the burden of proof could not cure the Constitutional defect of a mandatory presumption of intent contained in another instruction. *Francis*, 471 U.S. at 315, 326. Unlike the mandatory presumption involved in *Francis*, the *McDonnell Douglas* jury instruction at issue here contained a *permissive* presumption. In *Cupp v. Naughten*, 414 U.S. 141 (1973), another criminal case involving claims of deprivation of

Constitutional rights, the Court held that a general instruction on the burden of proof and an instruction on the presumption of innocence were sufficient to correct any error in an instruction that every witness is presumed to tell the truth. Consistent with *Francis* and *Cupp*, the Eighth Circuit, sitting *en banc*, found that any alleged error in the burden-shifting instruction was overcome by the directive contained in the general instruction on plaintiff's burden of proof.

Finally, KARE argues that a question propounded by the jury demonstrates that the alleged error in the *McDonnell Douglas* jury instruction affected the outcome of the trial. KARE asks this Court to take an inappropriate leap of faith that the jury's question was engendered by the allegedly erroneous instruction. The Court's role in granting certiorari is not to review a case merely to attempt a futile inquiry into the jury's thought process.

The only jury instruction issue properly included in the Petition, the burden-shifting language used by the trial court, is not worthy of review by certiorari.

III. THE SUPREME COURT SHOULD NOT GRANT CERTIORARI IN THIS CASE BECAUSE THE RESOLUTION OF A POSSIBLE CONFLICT IN THE CIRCUIT COURTS WOULD NOT AFFECT THE OUTCOME.

KARE, to gain review of this case on certiorari, misrepresents the *en banc* opinion of the Eighth Circuit in its Petition. KARE incorrectly interprets the opinion as allowing plaintiffs to avoid judgment as a matter of law upon a mere showing of a prima facie case and pretext. *Compare* App., pp. 9-11 *with* Petition, pp. 3, 24. In its Petition, KARE has ignored the Eighth Circuit's clearly articulated standard:

> This is not to say that, for the plaintiff to succeed, simply proving pretext is necessarily enough. We emphasize that evidence of pretext will not by itself be enough to make a submissible case if it is, standing alone, inconsistent with a reasonable inference of age discrimination. [Footnote omitted]. Furthermore, as the *Hicks* Court explained, the plaintiff must still persuade the jury, from all the facts and circumstances, that the employment decision was based upon intentional discrimination. [Footnote and citation omitted]. Obviously, in all age discrimination cases, the plaintiff must produce sufficient evidence of the elements of the prima facie case and where necessary, adduce sufficient proof of pretext to meet the traditional tests of summary judgment and judgment as a matter of law.

App., pp. 10-11. Part I.A. of the dissenting opinion, which is joined by seven judges, further defines the legal standard adopted by the Eighth Circuit.

> . . . [U]nder this standard, while plaintiff may rely on the same

> evidence to prove both pretext and discrimination, that evidence must be sufficient to prove that the employer is guilty of intentional discrimination. Therefore, a trial judge may decide on a motion for summary judgment or JAML that the evidence is insufficient for a reasonable trier of fact to infer unlawful discrimination, even if plaintiff has presented some evidence of pretext. We review rulings on such motions under our traditional summary judgment and JAML standards.

App., p. 39. KARE's characterization of the *en banc* decision is inconsistent with both the majority and dissenting opinions in this case. *See* Petition, p. 24.

After misstating the standard adopted by the Eighth Circuit *en banc*, KARE suggests this case is worthy of the Court's review because other federal circuits have taken inconsistent positions regarding the proper interpretation of *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). KARE cites *Sheridan v. E.I. DuPont deNemours & Co.*, 100 F.3d 1061 (3rd Cir. 1996) (*en banc*), *pet. for cert. filed,* 65 U.S.L.W. 3571 (Feb. 3, 1997) and *Rhodes v. Guiberson Oil Tools,* 75 F.3d 989 (5th Cir. 1996) (*en banc),* as exemplifying the opposite positions which the circuits have taken.

In *Sheridan*, the Third Circuit, sitting *en banc*, held that the jury has the right to infer discrimination from evidence

which is sufficient to establish a prima facie case and the dishonesty of the employer's explanation for its action.

> . . . [O]nce the court is satisfied that the evidence meets this threshold requirement, it may not pretermit the jury's ability to draw inferences from the testimony, including the inference of intentional discrimination drawn from an unbelievable reason proffered by the employer.

Sheridan, 100 F.3d at 1072. The Third Circuit correctly noted that its holding does not strip the courts of their responsibility to review the adequacy of the facts presented to the fact-finder. *Sheridan*, 100 F.3d at 1072. Judgment as a matter of law remains appropriate where there is insufficient evidence to permit a reasonable trier of fact to find that the explanation proffered by the employer is not truthful. *Sheridan*, 100 F.3d at 1072.

In *Rhodes*, The Fifth Circuit, sitting *en banc,* discussed the viability of verdicts based solely on evidence of a prima facie case of discrimination and the jury's disbelief of the employer's proffered explanation. ". . . [O]rdinarily such verdicts would be supported by sufficient evidence, but not always." *Rhodes,* 75 F.3d at 993. The *Rhodes* court, however, found that judgment as a matter of law was not appropriate in that case because the plaintiff had proven sufficient facts to show that his termination was based on his age. *Rhodes,* 75 F.3d at 996.

While the precise breakdown of the circuits on the appropriate interpretation of *Hicks* is not germane to this case,

as discussed below, KARE's mischaracterizations of the decisions of other circuits in the Petition require correction. *See* Sup. Ct. R. 15.2.

KARE cites *Isenbergh v. Knight-Ridder Newspaper Sales, Inc.*, 97 F.3d 436 (11th Cir. 1996) and *Woods v. Friction Materials, Inc.*, 30 F.3d 255, 260 (1st Cir. 1994)[5] as having holdings which are consistent with the *Rhodes* court's conclusion. As in *Rhodes*, the decisions in the *Isenbergh* and *Woods* cases turn on findings that the plaintiffs failed to provide sufficient evidence to establish that their employers' proffered reasons for their actions were pretextual. The "holdings," therefore, are merely *dicta*.

KARE also cites *Chertkova v. Connecticut General Life Ins. Co.*, 92 F.3d 81 (2d. Cir. 1996) as being similar to *Rhodes*. In *Chertkova*, the Second Circuit found that the plaintiff had presented evidence from which a jury could infer discrimination. The court's statement, cited by KARE, that an employee must show that the reason given by the employer for discharge was false and that the real reason was discrimination simply recognizes that "pretext" means "pretext for discrimination." *See St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 516 (1993); *but see Guadagno v. Wallack Ader Levithan Associates*, 950 F. Supp. 1258 (S.D.N.Y. 1997). The *Chertkova* case does not address the propriety of a motion for summary judgment or judgment as a matter of law where there is evidence of a prima facie case and pretext for discrimination.

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[5] The language KARE quotes from the *Woods* case is actually an internal citation to *LeBlanc v. Great American Insurance Co.*, 6 F.3d 836 (1st Cir. 1993), *cert. denied*, 511 U.S. 1018 (1994).

In *Jiminez v. Mary Washington College*, 57 F.3d 369 (4th Cir.), *cert. denied* ___ U.S. ___, 116 S. Ct. 380 (1995), also relied upon by KARE to show a split with *Sheridan*, the Fourth Circuit reviewed a trial court's finding after a bench trial. The appellate court rejected the trial court's factual finding that the plaintiff had rebutted the university's reason for denying tenure. Like the *Chertkova* court, the Fourth Circuit embraced the *Hicks* distinction between pretext and pretext *for discrimination.* The *Jiminez* court, however, did not reach the issue of when an inference of discrimination can be drawn from a showing that an employer's proffered reason is false.

KARE's most egregious misstatement of law involves the Sixth Circuit's decision in *Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078 (6th Cir. 1994). KARE contrasts *Manzer* with cases holding that the jury is always entitled to draw an inference of discrimination from the prima facie case and a showing of pretext. The *Manzer* court, however, held,

> . . . *Hicks* clarified that the only effect of the employer's nondiscriminatory explanation is to convert the inference of discrimination based upon the plaintiff's prima facie case from a mandatory one which the jury *must* draw, to a permissive one the jury *may* draw, *provided* that the jury finds the employer's explanation 'unworthy' of belief.

Manzer, 29 F.3d at 1083 (emphasis in original). KARE's citation to the language in *Manzer* regarding a requirement of additional evidence of age discrimination is taken out of context.[6] *Manzer*'s requirement of additional evidence applies only where the plaintiff attempts to use the prima facie case to establish that "the sheer weight of the circumstantial evidence of discrimination makes it 'more likely than not' that the employer's explanation is a pretext. . . ." *Manzer*, 29 F.3d at 1084. In other words, *Manzer* requires some evidence beyond the prima facie case to establish pretext; it does not require additional evidence beyond pretext.

Regardless of whether, or to what extent, a split exists, this is not a proper case for the Court to address issues raised by the application of *Hicks*. The Eighth Circuit has already affirmed the verdict for Ryther under the strictest standard applied by the circuits. KARE incorrectly aligns the Eighth Circuit's position with the Third Circuit in *Sheridan*. The Eighth Circuit, in language ignored by KARE, distinguished its holding from *Sheridan*: "*Sheridan* does not expressly acknowledge, as we do today, that evidence of pretext *does not always* support an inference of intentional discrimination." App. 8, n. 2 (emphasis in original). Contrary to KARE's contention, the Eighth Circuit's decision is similar to the opinion in *Rhodes*, which measures the submissibility of the plaintiff's case against a higher standard than required in *Sheridan*. Any clarification by this Court of the *Hicks* standard will not impact the result in this case.

If this Court was to accept the view espoused by the Third Circuit. Ryther would prevail. There is no doubt that he established a prima facie case and evidence of pretext. App.,

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[6] KARE's quote from *Manzer* appears on page 1085 of the decision not 1083 as cited. Petition, p. 28.

p. 28. Acceptance of the standard adopted by the Fifth Circuit, likewise, would not affect the Eighth Circuit's decision. It already adopted such a standard and determined that Ryther submitted additional evidence of age discrimination beyond pretext, which was sufficient to allow the jury to find in his favor.

> We hold the record as a whole supports a reasonable inference that *age discrimination* motivated KARE 11's decision not to renew Ryther's contract. The plaintiff produced overwhelming evidence as to the elements of a prima facie case, and strong evidence of pretext, which, when considered with indications of age-based animus in Ryther's work environment, clearly provide sufficient evidence as a matter of law to allow the trier of fact to find intentional discrimination. As the experienced district judge stated, "[i]t is clear that the jury believed Ryther's evidence and did not believe defendants' proffered explanation." *Ryther*, 864 F. Supp. at 1517.

App., p. 28.

Given the standard employed by the Eighth Circuit *en banc*, KARE can only achieve reversal of the jury's verdict if this Court re-evaluates the facts of this case and accepts the facts most favorable to KARE as set forth in the Petition's

Statement of the Case. KARE's statement that Thomas Kirby, a former KARE news executive, had decided to terminate Ryther, is a good example of how KARE has erroneously presented the facts in the light most favorable to it. KARE ignores the testimony of William Jones, Ryther's negotiating agent, that Kirby engaged in enthusiastic negotiations to renew Ryther's contract. *Compare* Petition, p. 5 *with* TR IV/38-39. Re-examination of the factual record is not the role of the Supreme Court. This case has not met the high standard for review by certiorari. *See* Sup. Ct. R. 10.1.

IV. FINAL RESOLUTION OF THIS CASE SHOULD NOT BE DELAYED IF CERTIORARI IS GRANTED IN ANOTHER CASE ON THE *HICKS* ISSUE.

On February 3, 1997, a petition for writ of certiorari was filed in *Sheridan v. Du Pont deNemours & Co.*, 100 F.3d 1061 (3d. Cir. 1996) *(en banc)*. As discussed above, neither an affirmance or reversal of *Sheridan* will impact the Eighth Circuit's result in *Ryther v. KARE 11*, 108 F.3d 832 (8th Cir. 1997) (*en banc*). Accordingly, final resolution of this case, which has been delayed for more than three and one-half years from the date of the jury verdict, should not await determination by this Court if certiorari is granted in the *Sheridan* case.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Petition for a Writ of Certiorari be denied.

April 22, 1997 Respectfully submitted,

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